

Mar 06, 2018

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

EDWARD MC ELMURRY and EVA  
MC ELMURRY, INDIVIDUALLY and  
the marital community thereof,  
Plaintiffs,  
v.

RUSSELL INGEBRITSON and JANE  
DOE INGEBRITSON  
INDIVIDUALLY, and the marital  
community thereof and AGENTS/  
OWNERS OF INGEBRITSON and  
ASSOCIATES, A MINNESOTA  
ENTITY,  
Defendant.

No. 2:16-cv-00419-SAB

**ORDER RE: DEFENDANTS'  
MOTION FOR SUMMARY  
JUDGMENT**

Before the Court is Defendants' Motion for Summary Judgment, ECF No. 57, and several motions related thereto. The motions were heard without oral argument.

On November 30, 2017, Plaintiffs Edward and Eva McElmurry filed a Complaint for Legal Malpractice against Russell and Jane Doe Ingebritson and Agents/Owners of Ingebritson and Associates. ECF No. 1. Plaintiffs allege that

1 Edward McElmurry (“Plaintiff”) was injured in a car accident on the job while an  
2 employee of BNSF Railroad. Plaintiff contends that Russell Ingebritson  
3 (“Defendant”) agreed to represent him on a contingent fee basis in a Federal  
4 Employers Liability Act (“FELA”), 45 U.S.C. § 51, *et seq.*, lawsuit against his  
5 employer. Plaintiff further alleges that Defendant failed to file a FELA action  
6 prior to the expiration of the statute of limitations. The Court denied Plaintiffs’  
7 motion for summary judgment, ECF No. 47, and declined to reconsider its  
8 decision, ECF No. 53. Defendants now move for summary judgment and seek to  
9 strike Plaintiffs’ response as untimely or, alternatively, strike certain evidence as  
10 inadmissible. ECF No. 70. Plaintiffs filed a conditional motion to dismiss should  
11 the Court strike its pleadings. ECF No. 74.

### 12 **Defendants’ Motion to Strike**

13 First, Defendants request that the Court strike Plaintiffs’ response to its  
14 motion for summary judgment as untimely. The Court declines to strike Plaintiffs’  
15 response, filed six days after the deadline, in the interests of judicial economy.

16 Alternatively, Defendants seek to strike portions of the declarations of  
17 Edward McElmurry and William Schroder, and evidence contained in a police  
18 report as hearsay. Hearsay is a statement that a party offers in evidence to prove  
19 the truth of the matter asserted in the statement and is not made by the declarant  
20 while testifying at a current trial or hearing. Fed. R. Evid. 801. Hearsay is  
21 inadmissible unless otherwise provided by statute, the Federal Rules of Evidence,  
22 or other rules prescribed by the United States Supreme Court. Fed. R. Evid. 802.

23 With regard to Mr. McElmurry, Defendants move to strike the following as  
24 impermissible hearsay: “I heard him state to me and the State Patrol that he was  
25 distracted. He also told me he dropped his wedding ring and got a phone call  
26 before the accident,” ECF No. 63 ¶ 3; and “He said he did not see me until  
27 immediately before impact, he said he did not see me until it was too late. He said  
28 he was going about 70-75 m.p.h. and he did not see me until it was too late.” ECF

1 No. 63 ¶ 4. Both of these statements constitute impermissible hearsay. The Court  
2 will not consider these statements in ruling on Defendants’ motion.

3 Defendants also seek to strike portions of a police report wherein the  
4 reporting officer writes that Todd Johnson was “distracted by a ringing phone”  
5 when he struck Plaintiff’s automobile. ECF No. 65. Hearsay contained in a police  
6 report is inadmissible. *Colvin v. United States*, 479 F.2d 998, 1003 (9th Cir. 1973).  
7 Entries in a police report based on an officer’s observation and knowledge may be  
8 admitted, but statements attributed to other persons are clearly hearsay, and  
9 inadmissible unless an exception applies. *Id.* The Court strikes this portion of the  
10 police report as it is not based on the reporting officer’s observations.

11 Defendants further request that the Court strike the following portions of  
12 the Declaration of William Schroeder as not based on sufficient facts: “It is my  
13 opinion that BNSF’s failure to provide luggage restraints created an unsafe place  
14 to work for Mr. McElmurry in violation of its duties under FELA,” ECF No. 66 ¶  
15 4; and “Dr. Powers [sic] medical opinion adequately meets the FELA causation  
16 standard,” ECF No. 66 ¶ 5. Contrary to Defendants’ assertion, Dr. Schroeder’s  
17 expert report identifies the facts on which he relies and sets forth his opinion.  
18 Accordingly, Defendants’ motion is denied with regard to Dr. Schroeder’s  
19 Declaration.

### 20 **Plaintiffs’ Conditional Motion to Dismiss**

21 In the event that the Court was inclined to strike Plaintiffs’ response as  
22 untimely, Plaintiffs moved for a conditional dismissal without prejudice under  
23 Fed. R. Civ. P. 41(a)(2). This motion is denied. Moreover, it would not be proper  
24 to allow Plaintiffs to dismiss this action voluntarily because of their untimely  
25 response after Defendants filed their motion for summary judgment.

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### 28 **Disputed Facts**

1 The disputed facts are detailed in the Court's Order Denying Plaintiffs'  
2 Motion for Summary Judgment, ECF No. 47, and will not be comprehensively  
3 discussed here. However, since the Court's ruling, the parties have engaged in  
4 additional discovery relating to the accident in question.

5 The collision at issue in this lawsuit occurred in the late afternoon on June  
6 15, 2012 on Interstate-90 outside of Spokane, Washington. At the time of the  
7 collision, Todd Johnson was on his hands-free Bluetooth device when his  
8 telephone call cut out. The telephone rang again, he picked it up using his  
9 Bluetooth device, and a car driven by Plaintiff suddenly pulled out in front of him  
10 in the left-hand lane traveling approximately five miles per hour. Mr. Johnson  
11 testified that at the time he was driving approximately seventy miles per hour and  
12 had no time to stop or hit the brakes. As a result, a collision occurred and Mr.  
13 Johnson's vehicle went over the top of Plaintiff's work vehicle and flipped three  
14 times.

15 Plaintiff disputes Mr. Johnson's version of the facts, stating that Plaintiff  
16 was traveling in the same lane as Mr. Johnson for several minutes. According to  
17 Plaintiff, Mr. Johnson should have had an abundance of time to stop before the  
18 collision. Plaintiff also declares that an unsecured tub of tools struck the back of  
19 his seat during the collision and caused a low-back injury. The parties dispute  
20 whether this information was ever conveyed to Defendants. Timothy Powers,  
21 M.D., treated Plaintiff for these injuries, and opined that his lumbar spine  
22 condition was related to the collision on a more probable than not basis. ECF No.  
23 64. He also opines that the unsecured tub of tools that struck Plaintiff contributed  
24 to this condition on a more probable than not basis.

### 25 Legal Standard

26 Summary judgment is appropriate if the pleadings, discovery, and affidavits  
27 demonstrate there is no genuine issue of material fact and that the moving party is  
28 entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317,

1 323 (1986) (citing Fed. R. Civ. P. 56(c)). There is no genuine issue for trial unless  
2 there is sufficient evidence favoring the nonmoving party for a jury to return a  
3 verdict in that party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250  
4 (1986). The moving party has the burden of showing the absence of a genuine  
5 issue of fact for trial. *Celotex*, 477 U.S. at 325; *see also Fair Hous. Council of*  
6 *Riverside Cty., Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001).

7 When considering a motion for summary judgment, the Court neither  
8 weighs evidence nor assesses credibility; instead, "[t]he evidence of the non-  
9 movant is to be believed, and all justifiable inferences are to be drawn in his  
10 favor." *Anderson*, 477 U.S. at 255. When relevant facts are not in dispute,  
11 summary judgment as a matter of law is appropriate, *Klamath Water Users*  
12 *Protective Ass'n v. Patterson*, 204 F.3d 1206, 1210 (9th Cir. 1999), but "[i]f  
13 reasonable minds can reach different conclusions, summary judgment is  
14 improper." *Kalmas v. Wagner*, 133 Wash. 2d 210, 215 (1997).

### 15 Discussion

16 In order to establish a legal malpractice claim, a plaintiff must demonstrate  
17 "(1) [t]he existence of an attorney-client relationship which gives rise to a duty of  
18 care on the part of the attorney to the client<sup>1</sup>; (2) an act or omission in breach of  
19 the duty of care; (3) damage to the client; and (4) proximate causation between the  
20 attorney's breach of the duty and the damage incurred." *Hizey v. Carpenter*, 119  
21 Wash. 2d 251, 260-61 (1992). Defendants move for summary judgment on the  
22 issue of causation. In order to succeed in a legal malpractice action, Plaintiffs must  
23 demonstrate that, but for Defendant's negligence, Plaintiff probably would have  
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25 <sup>1</sup> As previously noted in the Court's Order Denying Plaintiffs' Motion for  
26 Summary Judgment, ECF No. 47, genuine issues of material fact exist as to  
27 whether an attorney-client relationship between Plaintiff and Defendant was ever  
28 formed. This disputed fact must be decided at trial.

1 prevailed on the underlying claims. *Schmidt v. Coogan*, 162 Wash. 2d 488, 492  
2 (2007).

### 3 **Reflective Tape Theory**

4 Plaintiff alleges that his employer was negligent in failing to install  
5 reflective tape on the back of his work vehicle. Had this tape been installed,  
6 Plaintiff argues, no injury would have occurred. Plaintiff's contentions are  
7 unpersuasive. While Plaintiff may have proffered disputed facts as to whether  
8 Plaintiff and Mr. Johnson were traveling in the same lane prior to the collision, he  
9 has not demonstrated that installation of reflective tape would have altered the  
10 outcome. Mr. Johnson testified that the collision occurred in broad daylight with  
11 clear road conditions, that he saw Plaintiff's car, and that the incident would not  
12 have been prevented had reflective tape been installed. While Plaintiff suggests  
13 that Mr. Johnson was distracted and dropped his wedding ring, this is insufficient  
14 to create a genuine issue of material fact in order to overcome summary judgment.  
15 Defendants' motion is granted with respect to Plaintiff's reflective tape theory.

### 16 **Mesh Barrier Theory**

17 Plaintiff also alleges that his employer was negligent in failing to install a  
18 mesh barrier between the front seat and the back compartment of the vehicle. Had  
19 this mesh barrier been installed, Plaintiff argues that he would not have been  
20 injured by flying tools in the collision. Defendants contend that this theory of  
21 liability must fail because (1) Plaintiff did not plead this theory in his complaint;  
22 (2) Plaintiff never discussed this theory with Defendants; and (3) there is no  
23 causal relationship between the absence of mesh and Plaintiff's injuries.

24 First, while this theory is not pled in Plaintiffs' Complaint, it has been the  
25 subject of prior litigation, including at summary judgment. Accordingly, the Court  
26 finds that Defendants have sufficient notice of the mesh barrier theory of liability;  
27 any challenge should have been made in a prior motion.

1 Second, Plaintiff offered evidence that he mentioned the unsecured tub of  
2 tools that struck his back during the collision to Defendants. Defendants filed a  
3 competing declaration that Plaintiff never mentioned any mesh barrier theory of  
4 liability nor that his lower-back injury had any causal relationship to the collision.  
5 However, at summary judgment, the facts must be taken in the light most  
6 favorable to the non-moving party. Because Plaintiff has created a genuine issue  
7 of material fact as to whether this theory was ever mentioned to Defendants,  
8 Defendants' motion is denied on this ground.

9 Third, Dr. Powers opined that Plaintiff's lumbar spine condition is related  
10 to the collision on a more probable than not basis, and that the injury can be  
11 attributed to the unsecured tub to tools that struck Plaintiff's back on a more  
12 probable than not basis. Dr. Powers' testimony is uncontroverted and tends to  
13 establish a causal relationship between the flying tools and Plaintiff's injury.  
14 Because a genuine issue of material fact exists as to whether there is a causal  
15 connection between Plaintiff's injury and the lack of a mesh barrier, Defendants'  
16 motion for summary judgment as to this mesh barrier theory of liability is denied.

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27 Accordingly, **IT IS ORDERED:**

1 1. Defendants' Motion for Summary Judgment, ECF No. 57, is **GRANTED**  
2 **in part and DENIED in part.**

3 2. Defendants' Motion to Strike, ECF No. 70, is **GRANTED in part and**  
4 **DENIED in part.**

5 3. Defendants' Motion to Expedite, ECF No. 71, is **DENIED.**

6 4. Plaintiffs' FRCP 41(a)(2) Conditional Motion for Dismissal Without  
7 Prejudice, ECF No. 74, is **DENIED.**

8 5. Plaintiffs' Motion to Expedite, ECF No. 75, is **DENIED.**

9 **IT IS SO ORDERED.** The District Court Clerk is hereby directed to enter  
10 this Order and to provide copies to counsel.

11 **DATED** this 6th day of March 2018.



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A handwritten signature in blue ink, reading "Stanley A. Bastian", is written over a horizontal line.

Stanley A. Bastian  
United States District Judge